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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ODARIE MASSIAH, Defendant and Appellant.	B290212 (Los Angeles County Super. Ct. No. YA095527)

APPEAL from a judgment of the Superior Court of Los Angeles County, Scott T. Millington, Judge. Affirmed.

Randall Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant Odarie Massiah of inflicting an injury on someone with whom he had, or previously had, a dating relationship that resulted in a traumatic condition (corporal injury) (Pen. Code, § 273.5, subd. (a))[1] and misdemeanor resisting, obstructing, or delaying a peace officer (§148, subd. (a)(1)). The trial court stayed imposition of sentence and placed defendant on formal probation for five years under various terms and conditions, including the condition that he serve 365 days in county jail.

On appeal, defendant contends the trial court erred in failing to instruct the jury on battery as a lesser included offense of inflicting corporal injury on his girlfriend. We affirm.

II. BACKGROUND[2]

A. *The People's Case*

S.K.-C. testified that she and defendant had been in a relationship since at least early 2016. At the time of her testimony, S.K.-C. was defendant's fiancée. S.K.-C. and defendant had a three-month-old baby together and S.K.-C. had a

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1 All statutory citations are to the Penal Code.

2 We focus the factual recitation on those facts that concern the corporal injury conviction at issue on appeal and not the resisting conviction or the criminal threats and false imprisonment counts of which defendant was acquitted.

two-year-old child, not defendant's, whom defendant had helped care for since the child was a baby.

In January 2017, S.K.-C., her older child, and defendant lived with Melissa Murphy in Murphy's one-bedroom house in Inglewood. They stayed in Murphy's living room.

During the morning on January 19, 2017, while S.K.-C. and defendant were asleep, defendant's phone repeatedly rang. Defendant answered his phone. The call was from a woman who was "laughing, talking it up, and showing him her [whole] booty" in a video chat on his phone. S.K.-C. "could see the whole thing, so [she] felt disrespected."

The conversation lasted for about 10 or 15 minutes before S.K.-C. "threw a fit" and made defendant get off the phone. S.K.-C. and defendant argued and she cursed at him. Defendant was relatively calm, but S.K.-C. was yelling. S.K.-C. punched defendant on the lip.

According to S.K.-C., defendant said, "So you're really gonna hit me over this?" S.K.-C. responded, "Yeah, of course I'm gonna hit you. Look at what you're doing." S.K.-C. tried to "beat him in his face." She believed she struck his eye and cheekbone and tried to hit his "groin area." Defendant said, "[S.K.-C.], you're not gonna like the outcome of this. I'm not gonna be with you after this." Defendant's statement made S.K.-C. angrier. Defendant never became physical with S.K.-C.

Defendant started packing his clothes. S.K.-C. was afraid that defendant would leave. She approached defendant to stop him and slipped on something, falling on strollers and boxes and hitting her neck and ear. Shown a photograph of injuries on her face and neck, S.K.-C. said some of them occurred in her fall,

others when she intentionally scratched herself. Defendant did not inflict the injuries on S.K.-C.

Defendant stopped talking to S.K.-C. S.K.-C. tried to get defendant to talk to her, and when he would not, she walked out of the house. She intended to call the police to have defendant arrested to scare him.

Outside, S.K.-C. encountered her neighbor Johanna Bellamy and lied when she told Bellamy that defendant had beaten her and taken her baby. S.K.-C. was "dramatic and emotional" because she "had to make it believable." Bellamy went into her house and returned with her husband. They had a phone with "officers . . . already on the phone." S.K.-C. spoke with the 911 operator and reported that defendant had beaten her.

S.K.-C. told a code enforcement officer who happened to be at the location that her boyfriend had hit her. According to the officer, S.K.-C. had a bruise on her face and lacerations, scratches, and marks that appeared to be "fingerprints or squeezes" on her neck.

When the police arrived, S.K.-C. told the officers that she and defendant had gotten into a heated argument, defendant pushed her head onto the floor, and defendant held her head on the floor with his left hand and repeatedly punched her on the back of her head with his right hand. S.K.-C. reported that defendant grabbed her head and wrapped his left arm around her neck; held her by the neck in a headlock and chokehold; and squeezed her neck with his legs yelling, "Are you done fighting?" S.K.-C. said she could not breathe, could barely get out the word "stop," and was afraid defendant would choke her to death.

S.K.-C. testified that none of the things she told the police officers was true.

S.K.-C. admitted she told the police officers that she was attempting to leave Murphy's house and return to Iowa, defendant would not let her leave, and she and defendant got into a heated argument when she attempted to leave. She also told the officers that defendant grabbed her by the neck and choked her and threatened to kill her and her son. None of those things happened.

While defendant was in custody in jail, S.K.-C. spoke with him on the telephone. Recordings of portions of those conversations were played for the jury. One portion of those conversations was as follows:

S.K.-C.: "[I]t didn't need to go where it went. I'm like this is the first time, like we've had conversation about females how many fuckin' times and it's never gotten violent, ever."

Defendant: "Well baby, don't worry about it. And to be honest with you, it didn't really get violent because ain't nobody really get hurt, you know what I mean? So, I'm not trying—"

S.K.-C.: "Yeah, I was still walking. It wasn't like—I told everybody, Daniel hit me worse than you did. Daniel hit me, my ears [were] ringing, I couldn't see, I was chewing on my own teeth, like—."

Defendant: "And to . . . be honest babe, I was really trying to stop you from kicking and doing all that extra stuff. Like you was trying to like, you know what I mean?"

A second portion of those conversations was as follows:

Defendant (apparently referring to S.K.-C.'s conversation with the police): "And what did you tell them?"

S.K.-C.: "Like he didn't—well they have the recording anyway, so it's not really that big of a deal. But I mean, I basically told them what happened. I was like, he held me down, that's how he got the bite on his left thumb. Um, I did tell them how you choked me. Like I don't even want to tell—it's hard to even tell you what—[unintelligible]. Like that's, that's all I could think about afterwards is just feeling like I'm snitching, like I just snitched on you."

Defendant: "Ah babe, it's cool. It's cool. I'm not worrying about that because we know, I know at the time you was mad, so you could say anything out your mouth, you know?"

During the two months after the incident, S.K.-C. felt guilty about having lied to the police. She tried to call a police detective, but the detective did not answer. She faxed a letter to the deputy district attorney prosecuting the case admitting her lies.

B. *The Defense Case*

On January 19, 2017, Shimenese Norseweather, defendant's and S.K.-C.'s mutual friend, received a FaceTime video call from defendant. During the five-minute call, Norseweather saw S.K.-C. run to defendant and hit him. Defendant put his arm out so S.K.-C. could not hit him again. S.K.-C. bit defendant's chest and attempted to kick him in the groin.

Norseweather heard raised voices, but testified that defendant remained calm, while S.K.-C. was irate. Norseweather dropped her phone and called defendant right back. In the

second, seven-minute call, Norseweather saw S.K.-C. leaving the residence.

Defendant testified that on January 19, 2017, he and S.K.-C. were living together in Murphy's home. Although he was in a relationship with S.K.-C., defendant wanted to "test the waters." Around 9:00 a.m., that day, a female friend made a video call to defendant and was naked. S.K.-C. saw the naked woman on defendant's phone, and S.K.-C. and defendant argued.

Defendant did not immediately end the phone call with his friend which made S.K.-C. angrier. S.K.-C. threw a punch at defendant's face. Defendant tried to deflect the punch with his arm, but it landed. When S.K.-C. punched defendant in the face a second time, he said he was leaving her. Defendant did not do anything to "defend" himself.

Defendant walked to the closet to pack his belongings. S.K.-C. approached saying she wanted to make sure defendant did not take anything that belonged to her. Instead, she attempted to prevent defendant from packing his clothes. S.K.-C. attempted to hit defendant and slipped and fell.

Defendant called Norseweather on FaceTime. Defendant was giving S.K.-C. the silent treatment and said to Norseweather, "Look what this girl is doing." That defendant had called another woman—Norseweather—upset S.K.-C. and she tried to punch him several times. Defendant extended his arm and hand to fend off the blows. Defendant testified that he never touched S.K.-C., but S.K.-C. made contact with his extended hand several times and bit his finger as she tried to maneuver around his hand.

Throughout his interaction with S.K.-C., defendant remained calm. He denied that he held down S.K.-C. and

punched her, choked her, put her in a headlock, or put her head between his legs and applied pressure in a scissors-style hold.

S.K.-C. said, "Watch what I'm finna to do . . ." and walked out of the house. Defendant resumed packing his belongings. At some point, he walked outside to check on S.K.-C. There were police officers outside and defendant was arrested.

III. DISCUSSION

Defendant contends that the trial court prejudicially erred in failing to instruct the jury on battery as a lesser included offense of inflicting an injury on someone with whom he had, or previously had, a dating relationship that resulted in a traumatic condition. We disagree, holding that any error was harmless.

A. *Standard of Review and Legal Principles*

"Our review is de novo. [Citations.] Our Supreme Court held: '"On appeal, we review independently the question whether the trial court improperly failed to instruct on a lesser included offense." [Citation.]' [Citation.]" (*People v. Chestra* (2017) 9 Cal.App.5th 1116, 1122."

Battery against a person with whom a defendant currently has, or has previously had, a dating relationship in violation of section 243, subdivision (e)(1) is a lesser included offense of inflicting corporal injury on a person with whom the defendant currently has, or has previously had, a dating relationship. (See *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1457 ["Spousal battery in violation of section 243, subdivision (e)(1)[fn. omitted] is a lesser included offense of inflicting corporal injury on a

spouse"].) A trial court must instruct, sua sponte, on all theories of a lesser included offense that are supported by substantial evidence, but not those without such evidentiary support. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*Ibid.*)

"Generally, when a defendant completely denies complicity in the charged crime, there is no error in failing to instruct on a lesser included offense." (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 709; *People v. Chestra, supra,* 9 Cal.App.5th at p. 1123; *People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1021-1022.)

B. *Analysis*

Defense counsel requested the trial court to instruct the jury on battery against a person with whom the defendant currently has, or has previously had, a dating relationship in violation of section 243, subdivision (e)(1) as a lesser included offense of the inflicting corporal injury count.[3] The instruction

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[3] CALCRIM No. 841, the applicable instruction, provides in relevant part:

"The defendant is charged [in Count] with battery against [his/her] ([former] spouse/ cohabitant/fiancé[e]/a person with

was warranted, he argued, because the jury could believe the testimony about S.K.-C.'s out-of-court statements that defendant struck her and also believe S.K.-C.'s in-court testimony that "she

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whom the defendant currently has, or previously had, a (dating/ [or] engagement) relationship/the (mother/father) of (his/her) child) [in violation of Penal Code section 243(e)(1)].

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant willfully [and unlawfully] touched <*insert name of complaining witness*> in a harmful or offensive manner;

"[AND]

"2. <*insert name of complaining witness*> is (the/a) (defendant's [former] spouse/defendant's cohabitant/defendant's fiancé[e]/person with whom the defendant currently has, or previously had, a (dating/ [or] engagement) relationship/(mother/father) of the defendant's child)(;/.)

"<*Give element 3 when instructing on self-defense or defense of another.*>

"[AND

"3. The defendant did not act (in self-defense/ [or] in defense of someone else).]

"Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

"The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

"[¶] . . . [¶]

"[The term *dating relationship* means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations.] . . ."

caused the injuries herself by falling on the box and scratching herself."

The trial court declined to instruct on the lesser included offense. It stated, "I just don't see under your theory, [defense counsel], how a jury could find that he hit her but didn't cause those injuries. Either he hit her and caused the injury or he didn't. Therefore, the lesser included is going to be denied."

We doubt whether substantial evidence supported defendant's request to instruct on the lesser included offense; but even if there had been substantial evidence, reversal would not be warranted because defendant cannot demonstrate prejudice. A trial court's error in failing to instruct on a lesser included offense is reviewed for prejudice under the test in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Breverman, supra,* 19 Cal.4th at p. 178 [addressing a trial court's sua sponte duty to give a lesser included offense instruction].) Under that test, error in failing to instruct on a lesser included offense may result in reversal only if it appears reasonably probable the defendant would have obtained a more favorable outcome absent the error. (*Ibid.*)

Unlike the evaluation of whether a trial court erred in failing to instruct on a lesser included offense, appellate review under *Watson* "takes an entirely different view of the evidence. Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the

error of which the defendant complains affected the result. Accordingly, a determination that a duty arose to give instructions on a lesser included offense, and that the omission of such instructions in whole or in part was error, does not resolve the question whether the error was prejudicial. Application of the *Watson* standard of appellate review may disclose that, though error occurred, it was harmless." (*People v. Breverman, supra,* 19 Cal.4th at pp. 177-178, fn. omitted.)

Any error by the trial court in failing to instruct on the lesser included offense of battery was harmless. The evidence in support of the corporal injury conviction was relatively strong and the evidence in support of a battery conviction was comparatively weak. The evidence supporting the corporal injury conviction included S.K.-C.'s contemporaneous account of defendant's attack to the police in which she said that defendant pushed her head onto the floor, held her head down while repeatedly punching the back of her head, held her by the neck in a headlock and chokehold, and choked her to the point that she was afraid he would kill her. A code enforcement officer testified about seeing S.K.-C.'s injuries, including bruises and scratches on her face and "fingerprints or squeezes" on her neck. S.K.-C.'s subsequent recorded telephone conversations with defendant while he was in jail also corroborated that defendant hit and choked S.K.-C. In none of her contemporaneous accounts of defendant's attack to her neighbors, to the 911 operator, or to the police or in the portions of the recorded subsequent jail conversations played for the jury did S.K.-C. say that she sustained her injuries accidentally or that defendant did not inflict them.

By contrast, no explanation was provided about how defendant could have beaten S.K.-C. as he did without inflicting injury. Indeed, no witness testified to a coherent story where defendant attacked but did not injure S.K.-C. While S.K.-C. testified that she sustained her injuries through a fall, she also testified at trial that defendant did not strike her at all, and the evidence strongly suggested that S.K.-C. had a motive to fabricate her testimony at trial. Subsequent to and despite defendant's attack, she and defendant conceived and had a baby and she had become defendant's fiancée.

Considering the evidence adduced at trial, it is not reasonably probable that defendant would have obtained a more favorable outcome if the trial court had instructed the jury on battery as a lesser included offense of corporal injury. (*People v. Breverman, supra,* 19 Cal.4th at p. 178.)

IV. DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.